BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
MERLYN R. AND MARILYN A. KEAY)

For Appellants: Merlyn R. Keay,
in pro. per.

For Respondent: James C. Stewart
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code 1/ from the action of the Franchise Tax Board on the protest of Merlyn R. and Marilyn A. Keay against a proposed assessment of additional personal income tax in the amount of $360.00, plus interest, for the year 1978.

1/ All statutory references are to the Revenue and Taxation Code unless otherwise indicated.

The principal issue presented is whether one-half of each appellant's wages must be regarded as "earned income" of the other in determining eligibility for a retirement income credit.

Appellants, both under 62 years of age, resided in California throughout the year 1978. Mr. Keay is retired from the United States Air Force and receives a military pension. During 1978 he received pension payments totaling $23,018.15, and also $1,000.00 in wages as an employee of Copemen Enterprise, Inc. Mrs. Keay received wages in the amount of $6,014.20 as an employee of the Folsom-Cordova Unified School District. Appellants had no special agreement between themselves concerning the'property interest in either the pension income or the wages.

On their joint California personal income tax return for the year 1978 appellants claimed a $360.00 tax credit because of the military pension, pursuant to section 17052.9. In computing the credit, appellants treated wage income as income only of the particular spouse whose services gave rise thereto, rather than reflecting its community property nature by allocating such income equally between the spouses. Respondent concluded that the wages should have been treated as income allocable one-half to each spouse, and, as a result, respondent determined that appellants were not entitled to the credit claimed, or any portion thereof.

Pursuant to the applicable law, persons claiming tax credits based upon pensions received under a public retirement system are required to consider income other than pension income in determining, first, whether they are entitled to such a credit and, if so, in determining, second, the amount thereof. (§ 17052.9, subds. (e)(1), (e)(5), (e)(6), (e)(8).) One such type of income which must be considered is earned income. (§ 17052.9, subds. (e)(5), (e)(8).) For persons under the age of 62, the credit decreases as earned income exceeding $900.00 increases. (§ 17052.9, subd. (e)-(5)(D)(i).) For joint filers under age 62, no credit is allowable where each spouse's earned income equals or

exceeds $3,400.00. (§ 17052.9, subds. (e)(5), (e)(6).)[2/]

Appellants and respondent are in agreement that the wages constituted earned income; the dispute concerns the correct allocation of this in-come between the spouses. Appellants contend that they should be entitled to the allocation 'they made, while respondent urges that the wages should have been allocated one-half to each spouse. If appellants' position is correct, they are entitled to the $360.00 credit claimed. If respondent's position is correct, each spouse has earned income exceeding $3,400.00, 'and appellants would not be entitled to the tax credit.

We conclude that respondent's allocation is correct. All of the wages constituted community property under California law because the earnings of spouses while living together are community property, in the absence of a contrary agreement. (Civ. Code, §§ 5110, 5118; see In re Marriage of Jafeman, 29 Cal. App.3d 244 [105 Cal.Rptr. 4831 (1972).) There was no such agreement here. It is settled that for income tax purposes one-half of the community property income of California spouses is attributable to each spouse. (United States v. Malcolm, 282 U.S. 792 [75 L.Ed. 714] (1931); United States v. Mitchell, 403 U.S. 190 [29 L.Ed.2d 4061 (1971); Appeal of Idella I. Browne, Cal. St. Bd. of Equal., March 18, 1975.)

While citing no statutory authority contravening respondent's conclusion, appellants contend that because of a misleading statement in respondent's instruction pamphlet for use in computing the credit for the year 1978, respondent should be estopped from disallowing the tax credit. This pamphlet, obtained and

2/ Actually, to preclude the credit, only one spouse's earned income need be as high as $3,400.00, with the other's being substantially less. The $3,400.00 limitation with respect to one spouse is computed by adding to $900.00, earned income exempt from computation under section 17052.9, subd. (e)(S)(i), the $2,500.00 additional maximum amount which may be used to offset one spouse's earned income under section 17052.9, subds. (e)(5) and (e)(6). The maximum amount of the additional available offset for both spouses together is $3,750.00.

used by appellants, stated, in part: "For more information, please get the Federal Publication 524, Tax Credit for the Elderly." The edition of that federal publication for use in preparing 1978 federal returns specifically provided: "For years beginning after 1977, if you are married filing a joint return, you should disregard community property laws for purposes of computing the credit for the elderly on Schedule RP. The total of all taxable and nontaxable income **used in computing the credit is considered that of the individual whose services gave rise to the income."**

Because of the instructions in the federal publication, appellants disregarded the California community property law and treated all of the wages received in the manner directed by that publication. Appellants urge that they should be allowed to follow the instructions to which they were referred by respondent.[3/]

The federal statute, section 37(e)(8) of the Internal Revenue Code, which is authority for the above statement in the federal publication, provides that in the case of a joint return, the credit provision -shall be applied without regard to community property laws. However, section 17052.9, the California.counterpart of the. federal statute, contains no such provision. Therefore, in determining eligibility for the credit under the California Personal Income Tax Law, the community property statutes of this state should not be disregarded.

We agree that respondent's instructions were misleading because of the referral to the federal publication and the statement therein about disregarding community property laws. We conclude, however, that the estoppel doctrine does not apply to preclude denial of the tax credit. In the present situation, there is a total absence of any detrimental reliance. Even if a taxpayer is misled by the action of the government, this factor alone is not sufficient to warrant application of the doctrine of estoppel. Detrimental reliance must

3/ They also emphasize that the general state Form 540 instructions for the year 1978 expressly allowed use of the special federal form, as an alternative to using the state form, in computing the credit.

also be established. (Appeal of C. and B. F. Blazina, Cal. St. Bd. of Equal., Oct. 28, 1980; Appeal of Priscilla L. Campbell, Cal. St. Bd. of Equal., Feb. 8, 1979.) Appellants could not have relied to their detriment on respondent's instructions since the character of the wage income, as community property, had been established prior to use of the pamphlet. Therefore, there is an absence of detrimental reliance, and thus, the estoppel doctrine is inapplicable. (Appeal' of C. and B. F. Blazina, supra.)

A secondary issue concerns the liability for interest charges. Appellants urge that because of the misleading instructions, they should not be liable for them. Section 18688 of the Revenue and Taxation Code provides for interest upon the amount assessed as a deficiency from the date prescribed for the payment of the tax until the date paid. Appellants explain that because the credit would not have been claimed except for respondent's misleading representation, the interest is being imposed solely as a consequence of the representation. Consequently, they contend that respondent should be estopped from collecting interest.

Estoppel is an equitable principle which will be invoked against the government where the case is clear and the injustice great. In a proper case, the state can be estopped from collecting mandated statutory interest. (Market Street Railway Co. v. State Board of Equalization, 137 Cal.App.2d 87 [290 P.2d 20] (1955).) However, it has been established in several federal income tax cases that taxpayers should not regard such informal publications, as instruction pamphlets, 'as sources of authoritative law which give rise to the doctrine of estoppel where misleading statements are made therein. (See Thomas J. Green, Jr., 59 T.C. 456 (1972); Eugene A. Carter, 51 T.C. 932 (1969); see also Adler v. Commissioner, 330 F.2d 91 (9th Cir. 1964); Lewis F. Ford, ¶ 74,101 P-H Memo. T.C. (1974).) Moreover, the federal courts have consistently held that interest charges such as those imposed here constitute compensation for the use of money, rather than a penalty. (Ross v. United States, 148 F.Supp. 330 (D.Mass. 1957); Priess v. united States, 42 F.Supp. 89 (E.D. Wash. N.D. 1941).)

For these combined reasons, we conclude that the doctrine of equitable estoppel is also not applicable to preclude respondent from collecting the interest mandated by section 18688. (See also Appeal of Priscilla L. Campbell, supra.)

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Merlyn R. and Marilyn A. Keay against a proposed assessment of additional personal income tax in the amount of $360.00, plus interest, for the year 1978, be and the same is hereby sustained.

Done at Sacramento, California, this 9th day of December , 1980, by the State Board of Equalization. with Members Nevins, Bennett, Reilly and Dronenburg present.

Richard Nevins , Chairman

George R. Reilly , Member

Ernest J. Dronenburg, Jr. , Member

William M. Bennett , Member

_____ , Member